Filed 8/22/19 Banuelos v. Ortho Mattress, Inc. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RAMIRO BANUELOS, Plaintiff and Respondent, v. ORTHO MATTRESS, INC., Defendant and Appellant.	E070393 (Super.Ct.No. RIC1723763) OPINION

APPEAL from the Superior Court of Riverside County. Craig Riemer, Judge. Affirmed.

Hill, Farrer & Burrill, James A. Bowles and Elissa L. Gysi for Defendant and Appellant.

Blumenthal Nordrehaug Bhowmik De Blouw, Norman B. Blumenthal and Kyle R. Nordrehaug, for Plaintiff and Respondent.

Defendant and appellant Ortho Mattress, Inc. (Ortho) appeals the denial of its petition to compel arbitration against plaintiff and respondent Ramiro Banuelos. Banuelos brought an action for civil penalties under the Labor Code Private Attorneys

General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.). Because the state—the real party in interest in any PAGA action—was not a party to the arbitration agreement between Ortho and Banuelos, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

As alleged, Ortho employed Banuelos as a salesperson from 2016 to 2017 and failed to provide meal and rest breaks or other entitlements under the Labor Code. In 2017, Banuelos filed a class action complaint, which was later amended to bring a single PAGA claim as an aggrieved employee on behalf of the state.

Ortho petitioned to compel arbitration, arguing that Banuelos received a copy of Ortho's Mutual Arbitration Policy (MAP) and signed an applicable arbitration agreement when he was first hired.[1] The arbitration agreement provided in pertinent part as follows:

"I [Banuelos] agree . . . to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with the Company, except as otherwise set forth in the MAP. . . . The arbitration shall be a traditional bilateral arbitration with the Company and me as the parties unless otherwise specifically agreed to in writing and will be conducted under the Federal Arbitration Act and the applicable procedural rules of the American Arbitration Association ('AAA'). . . . Each party waives the right to initiate or proceed on a class action basis or participate in a class action in the arbitration."

---

[1] When an action is already pending, a party may seek an order compelling arbitration by either petition or motion. (See *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 349.)

The MAP similarly provides that disputes must be settled through "traditional bilateral arbitration" and waives the right to class actions.

The trial court denied the petition.

II. ANALYSIS

A. *Applicable Law*

Under the PAGA, "an 'aggrieved employee' may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (Lab. Code, § 2699, subd. (a).) Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency [(Agency)], leaving the remaining 25 percent for the 'aggrieved employees.' (Lab. Code, § 2699, subd. (i).)" (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980-981, fn. omitted.)

"As the [Agency] has 'the initial right to prosecute and collect civil penalties' under the Labor Code," aggrieved employees must first "provide a specified notice to [the Agency] before asserting a PAGA claim." (*Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 865 (*Julian*).) The PAGA "requires the employee to give written notice of the alleged Labor Code violation to both the employer and the . . . Agency, and the notice must describe facts and theories supporting the violation. ([Lab. Code], § 2699.3, subd. (a).) If the agency notifies the employee and the employer that it does not intend to investigate . . . or if the agency fails to respond within 33 days, the employee may then bring a civil action against the employer. (*Id.*, § 2699.3, subd. (a)(2)(A).) If the agency decides to investigate, it then has 120 days to do so. If the agency decides not to issue a citation, or does not issue a citation within 158 days after the postmark date of the

employee's notice, the employee may commence a civil action. (*Id.*, § 2699.3, subd. (a)(2)(B).)" (*Arias v. Superior Court, supra,* 46 Cal.4th at p. 981.)

In a PAGA action, the relevant question is not only whether the aggrieved employee bringing the action is a party to the arbitration agreement, but also whether the state is. It is well settled that the state is the real party in interest in a PAGA action. (See, e.g., *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 387 (*Iskanian*); *Betancourt v. Prudential Overall Supply* (2017) 9 Cal.App.5th 439, 449 (*Betancourt*).) This is because the "PAGA does not create any new substantive rights or legal obligations, but 'is simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies.'" (*Julian, supra,* 17 Cal.App.5th at p. 871.) And as the real party in interest, the state is not deemed a party to an arbitration agreement signed by an aggrieved employee unless the agreement was "postdispute"—that is, entered into after the employee became "authorized to commence a PAGA action as an agent of the state." (*Id.* at p. 870.) Accordingly, "an arbitration agreement executed before an employee meets the statutory requirements for commencing a PAGA action does not encompass that action." (*Id.* at p. 872; see also *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 622 ["[T]he state retains control of the right underlying the employee's PAGA claim at least until the state has provided the employee with implicit or explicit authority to bring the claim. [Citation.] At that point, an employee's waiver of the trial right and an agreement to arbitrate may be enforceable. [Citation.]

But before that time, the employee has no authority or authorization to waive the state's rights to bring the state's claims in court."].)

If, in a PAGA action, the state is not determined to be a party to the arbitration agreement, then the aggrieved employee may not be compelled to arbitration on the PAGA claim. In other words, the state—the real party in interest—has not agreed to arbitrate its claim merely because one who would *eventually* become authorized to bring the claim on the state's behalf signed an arbitration agreement. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (*United Steelwkrs. of Am. v. Warrior & Gulf N. Co.* (1960) 363 U.S. 574, 582; see also *Comedy Club, Inc. v. Improv West Associates* (9th Cir. 2009) 553 F.3d 1277, 1287 ["'The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement . . . .'"].)

"Whether an arbitration agreement is operative against a nonsignatory is determined by the trial court and reviewed de novo." (*Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1512.)

B. *Discussion*

Neither party contends here that Banuelos entered into a "postdispute" arbitration agreement. This is unsurprising, given that Banuelos alleges he sent the Agency written notice in December 2017, approximately two years after he signed his arbitration agreement. The state is therefore not bound by the arbitration agreement. (*Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 481; *Julian, supra*, 17 Cal.App.5th

at p. 872.) There is no indication in the record that the state has otherwise expressed its consent to arbitration here. Accordingly, the trial court properly denied Ortho's petition.

C. *Ortho's Arguments*

Ortho advances several arguments in contending the PAGA claim should be arbitrated. We consider each in turn.

1. *Delegation Clause*

First, Ortho contends that the trial court should never have considered whether the PAGA claim should be arbitrated, but rather should have allowed the arbitrator to decide it in the first instance. Ortho notes that the arbitration agreement incorporated the AAA's arbitration rules, which provided in part that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement [¶] . . . [¶] . . . or to the arbitrability of any claim or counterclaim."

Such a provision is sometimes referred to as a "delegation clause." (See *New Prime Inc. v. Oliveira* (2019) 586 U.S. __ [139 S.Ct. 532, 538, 202 L.Ed.2d 536].) Ortho asserts that, pursuant to the delegation clause, the trial court was wrong to have reached the question of arbitrability at all.

Cases interpreting the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.), however, have held that "the threshold issue of whether the delegation clause is even applicable to a certain party must be decided by the Court," and Ortho does not point us

to any cases to the contrary.[2] (*Soto v. American Honda Motor Co., Inc.* (N.D. Cal. 2012) 946 F.Supp.2d 949, 954; see also *In re Toyota Motor Corp. Hybrid Brake Marketing, Sales, Practices and Products Liability Litigation* (C.D. Cal. 2011) 828 F.Supp.2d 1150, 1159, fn. 5 ["Toyota argues that the arbitrator, rather than this Court, should decide the issue of whether a nonsignatory such as Toyota may compel Plaintiffs to arbitrate their claims . . . . Toyota cannot invoke the right to the benefits of the Purchase Agreement because it was not a party to the agreement; thus, the threshold issue of whether Toyota, as a nonsignatory, may compel Plaintiffs to submit to arbitration under the Purchase Agreements must be decided by this Court"].) This principle has been recently affirmed by the United States Supreme Court: "[t]o be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." (*Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 586 U.S. __ [139 S.Ct. 524, 530, 202 L.Ed.2d 480].) California cases interpreting the California Arbitration Act (Code Civ. Proc., § 1280 et seq.) are in accord. "California caselaw is clear that 'an arbitrator has no power to determine the rights and obligations of one who is not a party to the arbitration agreement'" and that "'[t]he question of whether a nonsignatory is a party to an arbitration agreement is one for the trial court [to decide] in the first instance.'" (*Benaroya v. Willis* (2018) 23 Cal.App.5th 462, 469; see also *American Builder's Assn. v. Au-Yang* (1990) 226 Cal.App.3d 170, 179 ["If an arbitrator, rather than a trial court, were to determine whether an arbitration provision were operative against a nonsignatory, a

[2] The parties do not dispute that the FAA applies to the arbitration agreement and MAP.

stranger to the agreement might be subjected to and be bound by an arbitration to which such stranger had not consented and would be without effective review."].)

Ortho relies on *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233 to argue that the arbitrator, not the trial court, should have determined arbitrability. *Sandquist*, however, is inapposite. In *Sandquist*, our Supreme Court addressed a narrow issue: "who decides whether the agreement permits or prohibits *classwide arbitration*, a court or the arbitrator?" (*Id.* at p. 241, italics added, original italics omitted.) This is not the issue here. As *Sandquist* recognized, "the availability or unavailability of class arbitration has nothing to do with whether the parties agreed to arbitrate." (*Id.* at p. 253.) The first question, *Sandquist* held, goes to "'what *kind of arbitration proceeding* the parties agreed to,'" which is a matter of contract interpretation that "'[a]rbitrators are well situated to answer . . . .'" (*Ibid.*) This case, on the other hand, concerns the second, and therefore *Sandquist* does not support Ortho's position.

We conclude that the trial court was correct to consider whether the delegation clause applied to the state. Moreover, the trial court correctly determined that the delegation clause did not apply.[3]

2. *Non-PAGA Relief*

Second, Ortho argues that the trial court incorrectly treated Banuelos as bringing only a PAGA claim despite the fact that the complaint alleges Labor Code violations and

[3] Because the trial court could not have simultaneously denied the petition and determined that the delegation clause applied, we infer the trial court concluded the delegation clause did not apply.

requests certain types of relief not covered by the PAGA. Echoing *Betancourt*, we observe that "[i]f [Ortho] believes [Banuelos's] complaint sets forth non-PAGA claims, then [Ortho] needs to challenge the pleadings. A motion to compel arbitration is not the proper procedural vehicle for sorting through alleged defects in the complaint. [Ortho] needs to challenge the defects it believes are in the complaint; and then, if there are private, non-PAGA actions, seek arbitration on those matters." (*Betancourt*, *supra*, 9 Cal.App.5th at p. 446.) Moreover, although Ortho makes much of the fact that Banuelos's PAGA claim "is split into at least four sub-claims for direct violations of the California Labor Code" (boldface omitted), it does not identify which violations may be brought under PAGA and which, if any, may not. (See *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 377 [to determine what the PAGA covers, one must "distinguish between a request for statutory penalties provided by the Labor Code for employer wage-and-hour violations, which were recoverable directly by employees well before the [PAGA] became part of the Labor Code, and a demand for 'civil penalties,' previously enforceable only by the State's labor law enforcement agencies"].) "We are not bound to develop" Ortho's arguments for it, and "[t]he absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived." (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.) Whether or not Banuelos's complaint contains non-PAGA claims is therefore not a ground for reversal here.

3. Iskanian *and* Betancourt

Third, Ortho asserts that both the trial court and *Betancourt* misinterpreted *Iskanian*. In Ortho's words, "*Iskanian*'s holding is not that PAGA claims are *per se* exempt from arbitration, but rather that California law bars predispute waivers of the right to seek PAGA penalties altogether. The trial court's decision misinterpreted *Iskanian* and relied on an erroneous holding in [*Betancourt*], which made the same mistake." Ortho characterizes *Betancourt* as "misread[ing] the ruling in *Iskanian* as prohibiting arbitration of PAGA claims." (Italics added.)

Ortho's characterization of *Iskanian* is accurate; its characterization of *Betancourt*, however, is not. In *Iskanian*, our Supreme Court held that "an employee's right to bring a PAGA action is unwaivable" and that such a rule was not preempted by the FAA to the extent the rule barred "predispute waiver[s] of an employee's right to bring an action that can only be brought by the state or its representatives." (*Iskanian*, *supra*, 59 Cal.4th at pp. 383, 388.) But *Betancourt* did not read *Iskanian* as exempting PAGA claims from arbitration altogether; actually, *Betancourt* disclaimed such a reading: "We have not interpreted *Iskanian* as prohibiting arbitration of all PAGA claims. . . . Our reading of *Iskanian* is limited to a defendant's reliance on a predispute arbitration agreement to compel arbitration when an employee becomes a type of *qui tam* plaintiff in a PAGA action." (*Betancourt*, *supra*, 9 Cal.App.5th at p. 448.)

Here, the trial court did not misapply *Iskanian* or *Betancourt*. The tentative ruling, which later was adopted as the final ruling, was not premised on any notion that PAGA claims are necessarily exempt from arbitration. To the contrary, by basing its ruling on

the fact that the state was not a party to the arbitration agreement, the trial court left open the possibility that a PAGA claim could be arbitrated had the state been a party. Accordingly, Ortho fails to articulate a basis for error under these cases.

4. *Individual PAGA Claim*

Fourth, Ortho asserts that Banuelos is entitled to pursue civil penalties for PAGA claims in his own name and that at least his individual claim should be arbitrated. This is contradicted, however, by the fact that the state is the real party in interest in a PAGA action and that the PAGA "'is simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies.'" (*Julian, supra,* 17 Cal.App.5th at p. 871.) As our cases have held, "a single representative claim cannot be split into an arbitrable individual claim and a nonarbitrable representative claim." (*Correia v. NB Baker Electric*, *supra*, 32 Cal.App.5th at p. 625.)

Ortho disputes that the state is the real party in interest in a PAGA action, citing *Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App.4th 562 (*Villacres*). The plaintiff in *Villacres* filed a PAGA action against his employer despite previously participating in a class action alleging similar violations against the same employer. (*Id.* at p. 569.) The PAGA action was filed just days after the previous class action was settled, and the trial court granted summary judgment for the employer on res judicata grounds, which the Court of Appeal affirmed. (*Ibid.*)

Villacres does not support Ortho here. For one, the opinion does not state when the plaintiff met the statutory requirements to bring a PAGA action, so it is not clear

whether the general release contained in his class action settlement agreement operated on a "predispute" or "postdispute" basis. Regardless, even if *Villacres* stood for the idea that a plaintiff could forego a PAGA claim on a "predispute" basis, *Iskanian*—which our Supreme Court decided four years after *Villacres*—makes that position no longer tenable.

5. *Severance*

Fifth, Ortho argues that Banuelos can be compelled to arbitration here even if the class action waiver in his arbitration agreement were severed. Our holding that the state is not bound by the arbitration agreement, however, does not depend on the existence or operation of the class action waiver. Accordingly, whether the class action waiver is severable or not does not affect our result.

6. *FAA*

Finally, Ortho argues that affirming the trial court's ruling would violate the FAA in two ways. First, Ortho contends that affirming the trial court would effectively create a rule "bar[ring] enforcement of the arbitration agreement as to PAGA claims," which would run afoul of the FAA because "a State cannot categorically exempt certain claims from arbitration." As Ortho points out, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 341.) But we are not barring enforcement of arbitration agreements as to PAGA claims, which, we have said, can be arbitrated; rather, we are barring enforcement of arbitration agreements against non-parties. Ortho's argument implies that claims between parties who *never agreed* to arbitrate—such as the state here—is a "particular type of claim"

(*ibid.*) that states must apply the FAA to. The FAA does not stretch that far. (*United Steelwkrs. of Am. v. Warrior & Gulf N. Co.*, *supra*, 363 U.S. at p. 582 ["[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"].) Requiring that an arbitration agreement apply only to those who are parties to it does not violate the FAA.

Second, Ortho contends that the trial court applied a rule that the United States Supreme Court recently struck down in *Kindred Nursing Centers Ltd. v. Clark* (2017) 581 U.S. __ [137 S.Ct. 1421, 197 L.Ed.2d 806] (*Kindred*). In *Kindred*, the United States Supreme Court held that a state law rule requiring an agent to "possess specific authority"—that is, authority beyond what is generally conveyed in a power of attorney—"to 'waive his principal's . . . rights to access the courts [and] to trial by jury'" violated the FAA. (*Kindred*, *supra*, 137 S.Ct. at pp. 1424-1425.) Such a rule, the Court held, "flouted the FAA's command to place [arbitration] agreements on an equal footing with all other contracts." (*Id.* at p. 1429.) Ortho argues that the trial court applied "essentially the same flawed rule . . . that employees, who are agents of the state for the purposes of PAGA, cannot agree to arbitrate PAGA claims without the State's express permission." But the supposed rule Ortho articulates does not exist. As we have stated, once an aggrieved employee becomes authorized by the state to bring a PAGA action on its behalf, the aggrieved employee may then agree to arbitration without the state's express permission. (*Correia v. NB Baker Electric, Inc.*, *supra*, 32 Cal.App.5th at p. 622.) An aggrieved employee needs no "specific authority" from the state to agree to arbitrate a PAGA claim—he or she merely needs to have met the PAGA's statutory

notice requirements to bring a PAGA claim in the first place. (*Julian*, *supra*, 17 Cal.App.5th at p. 870.) *Kindred* is therefore inapposite.

III. DISPOSITION

The order is affirmed. Banuelos is awarded his costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAPHAEL
J.

We concur:

RAMIREZ
P. J.

MILLER
J.